No. 85-5915

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

BRENDA E. WRIGHT, et al.,

Petitioners,

V.

CITY OF ROANOKE REDEVELOPMENT
AND HOUSING AUTHORITY

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR AMICUS CURIAE NATIONAL HOUSING LAW PROJECT IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Since 1968 the National Housing Law Project, a California non-profit corporation, has been a federally funded Legal Services support center which aids attorneys throughout the country who represent low-income clients with housing problems. In the course of its 18-year existence, the Project has developed broad and detailed knowledge of poor people's housing problems, of the history, purpose and intricacies of the federal housing laws, and of the mechanisms needed to ensure that those laws are carried out. In this case, the Project's interest is in ensuring that the Court is as fully informed as possible about the background of the federal housing laws and that the federal courts remain available to enforce those laws. This brief is filed with the consent of all parties.

SUMMARY OF THE ARGUMENT

Plaintiff public housing tenants sued in federal court for return of utility surcharges wrongfully extracted from them by their federally subsidized public housing agency. Amicus Curiae will limit its argument to three points. First, federal law grants plaintiffs a right to pay only 30 percent of their incomes for housing, including reasonable use of utilities. This right is guaranteed by mandatory provisions of federal statutory and regulatory law, which were enacted specifically to protect the tenants' interest in paying affordable rents. These laws contain sufficiently specific standards for judicial enforcement.

Second, Congress has manifested no intention, either expressly or implicitly, to prevent the courts from enforcing these rights under 42 U.S.C. § 1983.

Congress has not chosen to rely upon United States Department of Housing and Urban Development (HUD) as the exclusive enforcer of these federal laws.

Third, an order requiring the public housing authority to return the illegal overcharges is an appropriate remedy. Plaintiffs are merely seeking the return of their own money taken from them by defendant in deliberate disregard of clearly prescribed federal laws. Thus, the decision below, which rests upon unrealistic and unsupported assumptions about HUD's enforcement function, must be reversed. To do otherwise would severely undermine the effectiveness of Section 1983 which this Court has previously struggled to preserve, would do violence to Congress' intent to guarantee affordable rent levels to public housing tenants and would offend the most fundamental notions of fairness.

ARGUMENT

I. PLAINTIFFS HAVE A RIGHT SECURED BY FEDERAL LAW TO PAY NO MORE THAN THIRTY PERCENT OF THEIR INCOMES FOR SHELTER AND REASONABLE USE OF UTILITIES

Under 42 U.S.C. § 1983, plaintiffs must be seeking redress of rights secured by federal law. 42 U.S.C. § 1983; Maine v. Thiboutot, 448 U.S. 1 (1980); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28 (1981). Plaintiffs have such federal rights.

In 1969 when Congress enacted the Brooke Amendment, it reversed a long-standing policy granting local housing authorities wide discretion in setting their rents. By the Brooke Amendment, Congress decreed that tenants should pay no more than one-fourth of their incomes for rent. Relying upon the definition of rent that had been included in the original U.S. Housing Act, as well as the specific legislative history of the 1969

Amendment, HUD immediately interpreted the statute to mean that tenants could not be charged more than one-fourth of their incomes for shelter and reasonable use of utilities. HUD has followed that interpretation consistently. As early as 1963, HUD had established guidelines for the public housing agencies (PHAs) for determining when utility use is reasonable. In 1980 HUD formalized those standards in mandatory regulations. In disregard of those laws, the Roanoke PHA charged its tenants extra for use of utilities which they have a right to use without incurring any surcharges.

The statutory and regulatory laws upon which plaintiffs rely create rights for plaintiffs. Those provisions of federal law are mandatory. They were enacted solely to protect the tenants' interests. They provide sufficiently specific standards for measuring reason-

able utility use to which the tenants are entitled. Thus, the statutory and regulatory provisions upon which plaintiffs rely have the obligatory nature, the quality of specificity, and the purpose of protecting the plaintiffs' interests which "right creating" laws must have.

A. Payment of the Statutorily Prescribed Rent Grants Plaintiffs a Right Not Only To Live In Their Rented Homes But Also To Use the Utilities As Well, As Long As Their Use Is Not Excessive

The right created by the statute and its implementing regulations includes the right not to be surcharged for reasonable use of utilities. Although the term "rent" is not currently defined in the U.S. Housing Act itself, the original Act expressly stated that rent should include reasonable utilities. Pub. L. No. 75-412, § 2(1), 50 Stat. 888 (1937). That provision set income limits for

for applicants at five times the annual rental, and specified that annual rental included "the value or cost to them of heat, light, water and cooking fuel." Id.[1] The principle established by that provision, that rent entitles tenants to use a reasonable amount of utilities, has always governed the program's operation and was specifically included in the 1963 LOCAL HOUSING AUTHORITY MANAGEMENT GUIDE. 45 Fed. Reg. 59,502 (1980).

When Congress passed the Brooke Amendment, it was legislating against this background in which public housing rents included reasonable utility usage. In fact, the version of the Brooke Amendment reported out by the Senate Committee specified that rental means total shelter cost, "including any

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1. Pub. L. No. 81-171, § 306, 63 Stat. 429 (1949) expanded the definition to "water, electricity, gas, other heating and cooking fuels, and other utilities."

separate charges to a tenant for reasonable utility use and for public services and facilities."[2] Although the Conference substitute for the Senate bill did not include the specific definition of rental which had been in the Senate bill, that alteration reflected not a change in substance but merely an effort to simplify and shorten the relevant statutory language. As the Conference Report indicates, "the Conference substitute retains the basic concept of Section 211 of the Senate bill by generally limiting rents that may be charged public housing tenants to no more than 25 percent of their income." CONF. REP. 740, 91st Cong., 1st Sess. 30 (1969).

Immediately after the bill was enacted, HUD published a Circular specifically interpreting the statutory term

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2. S. 2864, § 211, 115 CONG. REC. 26,726 (1969); see S. REP. NO. 392, 91st Cong., 1st Sess. 46 (1969).

"rent" to include payment for the use of a reasonable amount of utilities.[3] That Circular applied the 25 percent of income limit to gross rent. Using the language from the original U.S. Housing Act almost verbatim, it defined gross rent as contract rent plus "the value or cost to the tenant for reasonable amounts of utilities" they had to purchase. It defined contract rent as the rent charged for the use of the dwelling and utilities supplied by the PHA. It defined utilities as "water, electricity, gas, other heating, refrigeration and cooking fuels, and other utilities." Id. at 4.

One month later HUD also explained that tenants who pay for their own utilities should get rent credits or cash payments if their reasonable utility costs

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3. HUD Circular, "Implementation of Sections 212 and 213 of the Housing and Urban Development Act of 1969," RHM 7465.1 and RHM 7475.1 (Mar. 16, 1970) (hereinafter HUD's March 16, 1970 Circular.)

exceed the rent limitation. HUD explained that "such adjustment is required to ensure compliance with the 25 percent limitation on gross rents and to ensure equitable treatment as between tenants who supply all or certain of their utilities and those for whom all utilities are supplied by the LHA."[4] This contemporaneous interpretation of the statutory language by the agency charged with its implementation is entitled to great deference. Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

In addition, HUD has without exception adhered to that interpretation ever since 1970.[5] In fact, in explaining why

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4. HUD Circular, "Rent Adjustments Required By Section 213 of the Housing and Urban Development Act of 1969," RHM 7465.3 (Apr. 24, 1970), App. 1, p. 3 (hereinafter April 24, 1970 Circular).

5. See 24 C.F.R. § 913.102 (1985) (definition of "tenant rent"); 24 C.F.R. § 965.470 (1985); former 24 C.F.R. § 865.470, 45 Fed. Reg. 59,505 (1980); former 24 C.F.R. § 860.403(a), (i) and (p), 40 Fed. Reg. 44,324 (1975) (definitions of contract rent, gross rent and utilities).

it was rejecting a proposal that Brooke Amendment rent should not include payment for utilities, HUD explained:

> the Department historically has considered "rent" under the public housing program to include both shelter cost and a reasonable amount for utilities. . . . The general standard of 'reasonable amounts of utilities' predated the Brooke Amendment and has not been questioned subsequently.

47 Fed. Reg. 35,250 (1982). See 49 Fed. Reg. 21,483 (1984).

B. The Statutory and Regulatory Provisions in Question Are Mandatory

For federal laws to secure a right within the meaning of Section 1983, they must impose mandatory obligations. Pennhurst State School and Hospital v. Halderman, 451 U.S 1, 28 (1981). The Brooke Amendment and its implementing regulations have that obligatory quality. Congress has established numerous goals for the federal housing programs, as it

did with the disabled persons Bill of Rights at issue in Pennhurst. See, e.g. 42 U.S.C. § 1437 (1982); 42 U.S.C. § 1441 (1982). Possibly, those policy declarations by themselves do not create rights protected by federal law within the meaning of Section 1983.[6] However, those general policies and goals are not at issue in this case. The rights plaintiffs seek to enforce here are protected by Section 3 of the U. S. Housing Act, an operative provision of the legislation that creates mandatory obligations.

The mandatory nature of this statute is revealed first by the statutory language. Section 3 of the Act now provides:

> A family shall pay as rent for a dwelling unit assisted under this Act the highest of the following amounts, rounded to the nearest dollar:

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6. See, e.g., Perry v. Housing Authority of Charleston, 664 F.2d 1210 (4th Cir. 1981); but see Commonwealth of Pennsylvania v. Lynn, 501 F.2d 848, 855 (D.C. Cir. 1974).

> (1) 30 percent of the family's monthly adjusted income;
>
> (2) 10 percent of the family's monthly income; or
>
> (3) If the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing cost, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

42 U.S.C. § 1437a(a) (1982). The first indication of the mandatory nature of this statutory provision is Congress' use of the word "shall," which leaves no discretion with the family to pay less or with the PHA to charge more.

A review of the changes in the rent limitation provision since 1969 confirms its mandatory nature. The 1969 amendment directed that rents "may not exceed one-fourth of the family's income, as defined by the Secretary." Pub. L. No. 91-152,

§ 213, 83 Stat. 389 (1969). That language granted the housing authority discretion to fix the rent as long as the amount chosen did not exceed the federal maximum. When the Act was revised extensively in 1974, the language was changed to read "the rental for any dwelling unit shall not exceed one-fourth of the family's income as defined by the Secretary." Pub. L. No. 93-383, § 201, 88 Stat. 653 (1974). If there was any ambiguity about the word "may" in the 1969 amendment, it was eliminated by Congress' use of "shall" in 1974.

In 1981 Congress adopted the current version of the rent limitation quoted above. In doing so, Congress eliminated the PHAs' previous discretion to charge less than the federally prescribed maximum. Because Congress has now set the exact rents itself, the statute no longer needs to be phrased as a limit

which the local PHA shall not exceed and it is not so phrased. Nonetheless, when viewed in this historical context, the present statutory language clearly creates not only a tenant duty to pay a specified amount of rent but also a mandatory PHA duty not to charge more.

An historical review of the PHA's changing role in the rent-setting process also demonstrates that these statutory provisions are mandatory and the PHAs have no discretion to disregard them. The original design of the Act was to provide federal assistance for the capital costs of developing housing projects. All other costs, including operating costs, were to be covered by rents. Public housing agencies were given full autonomy in setting their rents. Pub. L. No. 75-412, §§ 10(b) and 11(b), 50 Stat. 888, 892-93 (1937).

In 1959 Congress reaffirmed this

original scheme by adopting what became known as the local autonomy amendment. It vested in local PHAs maximum responsibility for establishing rents subject to the U. S. Housing Authority's approval. Pub. L. No. 86-372, § 501, 73 Stat. 654, 679 (1959). Between 1959 and 1969, however, as operating costs escalated much more rapidly than tenants' incomes, PHAs had to increase rents, which either extracted exorbitant portions of low-income families' incomes or excluded them altogether. In response, Congress adopted the Brooke Amendment in 1969, beginning the process which by 1981 withdrew all the discretion PHAs originally had in setting rents.

The first step in that evolutionary process was the imposition of the 25 percent limitation and the provision of federal operating subsidies to cover the lost rental income. The next step was

taken in 1974, when Congress required PHAs to charge tenants minimum rents equal to five percent of the tenant's gross income or the tenant's welfare grant for housing. Pub. L. No. 93-383, 88 Stat. 633, 654 (1974). In 1974 Congress also amended the operating subsidy provisions to require PHAs to set rents high enough to make the sum of all the rent charged equal to at least 20 percent of the sum of all the incomes of the PHA's tenants. 42 U.S.C. § 1437g(b) (1982). These two 1974 provisions thus narrowed the band within which PHAs could set rents by establishing federal maximums and minimums.

In 1981 Congress completed the process by eliminating the last vestige of PHA discretion to choose their own rents. The 1981 statutory amendment specifies the exact criteria the housing authority must follow. Although PHAs

retain discretion regarding other aspects of the program, on the issue of rents, Congress made the federal laws paramount and granted the PHAs no autonomy.

Related statutory provisions are also informative. The original Brooke Amendment included a provision stating:

> the requirement . . .that the rents fixed by public housing agencies may not exceed one-fourth of a low-rent housing tenant's income shall be effective not later than 90 days following the date of the enactment of this Act.

Pub. L. No. 91-152, § 213(b), 83 Stat. 389 (1969). By making the statutory provision effective on a specific date, Congress revealed its understanding that this provision was mandatory, not precatory. That revelation is made even more clear by the reference in the quoted statute to the rent limitation as a "requirement," a reference which was not an isolated incident. The very next sentence of the amendment specified that

the "requirement" shall not apply if application of the rent limit would merely reduce a public housing tenant's welfare assistance. Id.

Again, in 1970 when it enacted a statutory definition of income, Congress expressly referred to the Brooke Amendment as the "one-fourth of family income limitation." Pub. L. No. 91-601, § 208, 84 Stat. 1770, 1778 (1970). Congress also required that the new income definition "shall be effective at the first annual re-examination of the tenants' income subsequent to March 24, 1971." As with the 1969 amendment, Congress' decision to impose a mandatory effective date indicates that the Brooke Amendment was not a precatory statutory provision.

The legislative history dictates the same conclusion. The Conference Report quoted above at p. 8, describes the amendment as limiting the rents that may

be charged. CONF. REP. NO. 740, 91st Cong., 1st Sess. 30 (1969). Again, in discussing the exclusion of welfare tenants from the amendment, the Conferees referred to the rent limitation as a "requirement." Id.

The revisions of the bill during the legislative process provide further convincing evidence of its mandatory nature. The bill Senators Brooke and MacIntyre introduced did not expressly limit rents to twenty-five percent of income. See S. 2761, 91st Cong., 1st Sess., 115 CONG. REC. 21973 (1969). Instead, it granted HUD new authority to make rental assistance payments to PHAs which would then be able to reduce tenants' rents to one-fourth of their incomes. The "one-fourth of tenants' income" language was used only to measure the amount of the rental assistance payment, i.e., the difference between one-fourth of the tenant's income

and the actual rental for the unit. The Senate Committee's bill maintained that structure. See S. 2864, 91st Cong, 1st Sess. § 211; S. REP. NO. 392, 91st Cong., 1st Sess. 46 (1969). The House and Senate Conferees added the language clearly indicating that the one-fourth of tenant's income standard was to be a mandatory federally prescribed rent limitation. See CONF. REP. NO. 740, 91st Cong., 1st Sess. 11 (1969). This evolution of the statutory language, from initial provisions which might not have been read as obligatory to one which clearly was, further illuminates the deliberate congressional intention that the rent limitations be mandatory.

HUD's actions further confirm that the Brooke Amendment and its implementing regulations are mandatory. Immediately after the statute was adopted, HUD issued a Circular directing housing authorities

how to implement the new rent limitation. HUD's March 16, 1970 Circular, supra note 3. That Circular made three important points. First, a tenant's rent must not exceed 25 percent of income. Second, the rent limitation had to be effective not later than March 24, 1970. Third, if the March 24, 1970, deadline could not be met, the rent adjustments had to be put into effect retroactively to March 24, 1970. Id. at 1, 3 and 6. The Circular's repeated use of the word "shall," its constant reference to the statute as a limitation and a requirement, and the retroactive implementation scheme indicate that HUD interpreted the statutory provision to be mandatory. That is explicitly confirmed by the Circular's statement that the statute did not affect the PHAs' rent-setting power "except as the Act requires that no tenant pay more than 25 percent of income

for rent . . . ." Id. at 3. Such a contemporaneous interpretation of a newly enacted statutory provision by the agency charged with its administration must be given great weight. See Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

One month later, HUD reaffirmed that interpretation in its next implementing Circular. See HUD's April 24, 1970 Circular, supra note 4. That Circular, by its very title, indicated that HUD considered the statute mandatory. In the body of the Circular, HUD stated:

> The actions required by an LHA immediately are:
>
> 1. Recompute tenants' income, using latest verified family income and the Secretary's definition;
>
> 2. Compute rent at 25% of such income (see rent table, Appendix 3);
>
> 3. Compare with current rent to identify tenants entitled to reduction;
>
> 4. Notify affected tenants of adjusted monthly rent

and basis therefor;

5. Compute rent rebates from 3/24/70 to date adjustment is to be put into effect and apply as credit against future rent charges;

6. Reflect adjusted monthly rent in lease, as appropriate.

Id. at Appendix 1, p. 1. As Congress made further refinements in the Brooke Amendment in 1970 and 1971, HUD issued additional Circulars indicating how the local housing authorities should implement those changes.[7] The constant references throughout those Circulars to what the PHAs "shall" do leave no doubt that HUD interpreted the statute to be mandatory.

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7. HUD Circular, "New Definition of Income - Implementation of Section 208 of the Housing and Urban Development Act of 1970," HM 7465.10 (April 4, 1972); HUD Circular, "Implementation of Section 9, Public Law 92-213; Public Housing Rent Reductions, Welfare Families," HM 7465.13 (January 18, 1972) (hereinafter HUD's January 18, 1972 Circular); HUD Circular, "Additional Procedures for Implementing Section 9, PL 92-213, Public Housing Rent Reductions, Welfare Families," HM 7465.15 (September 14, 1972).

In 1975, when HUD finally published formal regulations in the Code of Federal Regulations to implement the Brooke Amendment's rent limitations, HUD adhered to its initial interpretation that the Brooke Amendment creates mandatory obligations. Former 24 C.F.R. §§ 860.401 through 860.409, 40 Fed. Reg. 44,324 (1975). Those regulations expressly directed that rent "shall not exceed" 25 percent of family income and constantly used the word "shall" in the regulatory definitions of income and other operative terms. Former 24 C.F.R. §§ 860.403 and 860.405. Similarly, HUD's current regulations, implementing the current version of the Brooke Amendment, use the same mandatory language. 24 C.F.R. § 913.107 (1985).

The mandatory nature of these federal laws is even more strikingly apparent in HUD's regulations specifying

how housing authorities must calculate reasonable use of utilities. See former 24 C.F.R. §§ 865.470 through 865.482, 45 Fed. Reg. 59,505 (1980). Throughout HUD repeatedly uses the word "shall" to indicate the actions which the PHA must take.[8] Any reading of these regulations must lead ineluctably to the conclusion that HUD has interpreted the Brooke Amendment to be mandatory and intends its implementing regulations to be equally as mandatory.[9]

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8. Thus, among other things, the regulations provide that the PHAs "shall establish" allowances (§ 865.473(a)); the allowances "shall be designed" to include utility consumption for major equipment (§ 865.473(b)); separate allowances "shall be established" for each utility and for each category of dwelling units (§ 865.474); the allowances "shall be based upon" consumption records (§ 865.476(a)); the allowances "shall be established" at levels sufficient to meet the requirements of about 90% of the dwelling units (§ 865.477); the surcharge "shall be computed" by applying the utility suppliers' average utility rate (§ 865.479); and, finally, PHAs "shall establish such allowances effective as of a date" not later than 120 days from the effective date of the rule (§ 865.482).

9. The 1984 regulations, which are not at

C. <u>These Mandatory Obligations Were Imposed to Protect Tenants' Interests</u>

For a law to create a right, the duties which it imposes on one party must be so imposed in order to protect the interests of a second party. Only if this second element is present can the legal provision be viewed as having "secured" a right. Courts have relied upon numerous factors to determine whether particular provisions of law create or secure rights. Whatever factors are considered to be relevant, whether they be the purpose of the law, the type of language used, the legislative history, or related statutory provisions, it is clear that the duties

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issue in this case, are similarly mandatory in nature. 24 C.F.R. §§ 965.470 through 965.480 (1985). As with the earlier regulations, HUD has repeatedly used the mandatory term "shall" to establish the steps which the PHAs must take and the standards which the PHAs must follow. E.g., 24 C.F.R. §§ 965.473, 965.474, 965.476(b), 965.476(d), 965.477, 965.478 and 965.480 (1985).

created by the Brooke Amendment and its implementing regulations secure the rights of public housing tenants.

An analysis of this element of the case must begin with the purpose of the Brooke Amendment. As is noted above, p. 16, by 1969 dramatic increases in operating costs had forced PHAs to raise rents so high that low-income families either paid exorbitant rents or were excluded from public housing altogether. Congressional recognition of this problem is evident in the legislative history of the 1969 amendment.[10] Congress' solution

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10. Senator McIntyre stated, "Local authorities have been forced to set minimum income requirements and raise rentals in order to meet the rising costs of maintenance and operation. As a result, more and more of the poor and very poor are barred from admission to public housing projects." 115 CONG. REC. 21,973 (1969). Senator Brooke argued: "tenants are unable, in many cases, to meet prior payment schedules without allocating a disproportionate share of their income to housing, and they find it impossible to do so as their rental payments increase still further." 115 CONG. REC. 26,721 (1969). Representative Dwyer observed: "the much higher costs of today are no longer able co be financed out of

was to impose the mandatory limit on tenants' rents to ensure that they would not be paying exorbitant portions of their incomes for rent and to provide additional subsidies for the rent lost by PHAs. Given the problem Congress faced, i.e., that poor people were paying too much, and the solution Congress chose, i.e., to limit the rent charged, it is clear that Congress' purpose was to protect the tenants' interests in not being charged more than they could afford.

This purpose is also revealed repeatedly in the legislative history. Every time the Amendment was discussed, either in a congressional report or on

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rental income and in many cases public housing rents now greatly exceed the tenants' ability to pay." 115 CONG. REC. 38,778 (1969) (see also remarks of Representative Sullivan); S. REP. NO. 392, 91st Cong., 1st Sess. 19 (1969) (operating costs "are too high for the very poor to bear"); 115 CONG. REC. 38,625 (1969) (remarks of Senator Proxmire).

the floor of the House or Senate, it was reiterated that the rent limitation was added to ensure that poor people could live in public housing without paying exorbitant rents. Senator Brooke's observation that "it would enable families, regardless of how low their incomes may be, to afford decent housing at a reasonable cost" is representative of the views expressed by all.[11]

Congress' language also shows that the rent limitations were imposed to create rights for tenants. It is noteworthy that the statute mentions only the families, the beneficiaries of the limitation, not the PHAs upon whom the duties are imposed. See 42 U.S.C. § 1437a(a) (1982). This focus upon the

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11. 115 CONG. REC. 21,973 (1969); see 115 CONG. REC. 21,974 (1969) (remarks of Senator MacIntyre); 115 CONG. REC. 26,721 (1969) (remarks of Senator Brooke); 115 CONG. REC. 38,778 (1969) (remarks of Representative Dwyer); S. REP. NO. 392, 91st Cong., 1st Sess. 19 (1969).

tenants in the statutory language is a strong indication that the federal laws create rights for these tenants. See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 690, n.13 (1979); Howard v. Pierce, 738 F.2d 722, 725-26 (6th Cir. 1984).

Even more telling is the structure which Congress chose, i.e., setting the rent at a percentage of the family's individual income, instead of specifying particular dollar maximums or relating rents to factors other than the tenants' own financial circumstances. That choice reveals that this limitation is imposed in order to protect the interests of specific low-income tenants, not low-income people generally, the society at large, the PHAs or the federal government. Individualizing the rent limitation in this manner and to this degree makes it clear that the statute is

intended to create rights for those individual families.[12]

D. The Federal Laws Plaintiffs Rely Upon Are Sufficiently Specific to "Secure" Their Rights

By drawing an analogy to the principle that judicial review of federal agency action is precluded when there is "no law to apply," Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971), one might conclude that some federal laws are not sufficiently specific to "secure" rights within the meaning

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12. That Congress was legislating to protect the tenants is also shown by the section of the original Brooke Amendment which specified that the rent limitation would not apply to a welfare family if HUD determined that limiting the rent would just reduce the family's welfare assistance. Pub. L. No. 91-152, § 213(b), 83 Stat. 379, 389 (1969). By thus making the limitation inapplicable when it would not benefit tenants, Congress revealed that the limitation itself was imposed in order to protect tenants. This concern with protecting tenants' interests is also reflected by Congress' insertion of the original amendment into a statutory provision that required housing authorities and HUD to consider the families' rent-paying abilities when fixing rents. Pub. L. No. 86-372, § 503, 73 Stat. 654, 680 (1959).

of Section 1983. Certainly reasoning of that sort is reflected in Phelps v. Housing Authority, 742 F.2d 816 (4th Cir. 1984), upon which the court below relied so heavily.

Nonetheless, the laws before the Court in this case are not of that character. The Brooke Amendment and its implementing regulations provide the judicially ascertainable standards the courts need to decide whether the law has been violated. The statute specifies with utmost clarity the amounts which tenants must pay as rent. 42 U.S.C. § 1437a(a) (1982). HUD's implementing regulations have clearly and continuously interpreted the statutory term "rent" to include payment for the use of a reasonable amount of utilities. See pp. 6-11, above. More importantly, HUD's regulations have set out clear and unambiguous standards which local housing

authorities must follow and steps the PHAs must take in determining the amount of utilities that tenants have a right to use without a surcharge. 24 C.F.R. §§ 965.470-480 (1985); former 24 C.F.R. §§ 865.470-482.

What is even more significant about this case is that the PHA did absolutely nothing to comply with the 1980 regulations. Instead, it merely "deemed" its allowances to be in compliance with the regulations. Int. Ans. No. 19(c). Thus, in deciding whether this housing authority has violated plaintiffs' rights, the court will have clearly ascertainable standards to guide its inquiry and will be performing a classic judicial function of applying law to the facts before it.

For example, the housing authority was obliged to base its allowances upon the actual consumption records for the types of units to be covered. Former 24

C.F.R. § 865.476(a). The Roanoke Housing Authority did not do that. The PHA was unambiguously obliged to establish the allowances high enough to meet the requirements of about 90 percent of the dwelling units. Former 24 C.F.R. § 865.477. Again, the Roanoke Housing Authority did not do that. The PHA was obliged to provide the tenants an opportunity to comment on the allowances. Former 24 C.F.R. § 865.482; see 24 C.F.R. § 965.473(c) (1985). The Roanoke Housing Authority did not do that. The PHA was obliged to submit the allowances to the HUD field office for approval. Former 24 C.F.R. § 865.473(a); see 24 C.F.R. § 965.473(d) (1985). Again, the Roanoke Housing Authority did not do that. To avoid tenant misunderstanding, the PHA was obliged to include a statement of the specific items of major equipment whose utility consumption requirements were

included in determining the amounts of the utility allowances. Former 24 C.F.R. § 865.473(b); see 24 C.F.R. § 965.473(c) (1985). Again the Roanoke Housing Authority did not do that.[13]

Thus, as the facts of this case graphically illustrate, a court which enforces public housing tenants' rights not to be surcharged for reasonable use of utilities will be undertaking a task which courts are well-equipped to perform and which is classically judicial in nature. To carry out that responsibility will not demand of the courts any expertise in the management of housing or in the intricacies of finance and economics.[14]

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13. See Int. Ans. Nos. 7, 10, 15, and 19.

14. It does not matter that the rights which tenants seek to enforce are made specific by the HUD regulations which implement the basic statutory provision. In 1969 this Court without dissent decided that rules promulgated by HUD pursuant to its general rulemaking power create rights for public housing tenants. Thorpe v.

II. CONGRESS HAS NOT PRECLUDED COURTS FROM ENFORCING THESE PLAINTIFFS' RIGHTS

A Section 1983 cause of action is unavailable when Congress has specifically precluded the plaintiffs from relying upon Section 1983 as authority to sue. Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1, 20-21 (1981). This Court has made it very clear, however, that the burden is upon the defendant to show such congressional intent to preclude a Section 1983 cause of action and that a court should be very reluctant to reach that conclusion. Id. at 20, n.31; Smith v. Robinson, ___ U.S. ___, 104 S.Ct. 3457, 3469

Housing Auth., 393 U.S. 268 (1969). Significantly, in Thorpe the rule in question had not even been formally promulgated in the Federal Register for codification in the Code of Federal Regulations. Instead, it was merely an unpublished Circular which HUD intended to incorporate into its PUBLIC HOUSING MANUAL. Certainly, if the Circular in Thorpe could create rights, the more formal and specific regulations at issue in this case do so.

(1984). In this case Congress has taken no such preclusive step. That the exact opposite is true is demonstrated by a careful review of (1) the express actions Congress has taken regarding judicial enforcement of the Brooke Amendment; (2) the ever narrowing role which Congress has conferred upon HUD regarding the Brooke Amendment; and (3) the severely limited capacity which HUD has to enforce the Brooke Amendment.

A. Congress' Express Actions

Two legislative developments, in 1981 and in 1983, constitute the only express congressional actions regarding judicial enforcement of the Brooke Amendment by private parties. In 1981 Congress changed the Brooke Amendment, raising the rent-to-income ratio and authorizing HUD to define income. See Pub. L. No. 97-35, § 322, 95 Stat. 400 (1981). When it did so, Congress also

exempted from judicial review HUD's determinations regarding the phase-in of those changes. Id. at § 322(i). When Congress considered HUL's bill precluding judicial review, Representative Vento said he thought it quite unusual to preclude tenants from bringing suit in district court and asked the HUD witnesses why they were proposing to do so. In response they testified:

> The provision that you have raised a question about is addressed only at the 5-year phase in of the increase, and is not intended, as I understand, to eliminate any tenants rights beyond that point.[15]

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15. Hearings before the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance and Urban Affairs, 97th Cong., 1st Sess., Part I, 654 (Serial No. 97-10, Apr. 8, 1981). HUD's written response for inclusion in the record on this question also defended the proposed preclusion of judicial review as follows:

> Limitations on reviewability are not unusual for narrowly drawn discretionary determinations of Federal officers.
>
> . . .

(Footnote continued)

Thus, even HUD understood its proposed 1981 preclusion of judicial review to be extremely limited and to preserve tenants' rights to enforce all other aspects of the Brooke Amendment.

Congress' action in 1983 is the most significant, however. Having quickly become dissatisfied with the only limit it had ever placed upon tenants' rights to enforce the Brooke Amendment, in 1983 Congress rewrote Section 322(i) of the 1981 Act and repealed the language which had exempted HUD's decisions from judicial review. Pub. L. No. 98-181, § 206(d) and (e), 97 Stat. 1180-81 (1983). This sequence of events, which constitutes Congress' only express action regarding judicial enforcement of the

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Review would be precluded only as to questions arising in the administration of the phase-in feature.

Id. at 655-656.

Brooke Amendment, provides a compelling demonstration that Congress' design is not to limit, but to maximize tenants' rights to enforce federal laws limiting their rents.[16]

B. Congress' Dissatisfaction with HUD

The ever-narrowing role regarding the federal rent limitations that Cong-

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16. HUD's own interpretation of the statute on this point is also significant. HUD's regulations immunize the PHA's utility allowances from tenant challenge unless they are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 24 C.F.R. § 965.473(e) (1985). HUD's proposed regulations contained a provision precluding tenants from challenging allowances in federal courts and limiting the tenants to state court enforcement. Proposed 24 C.F.R. § 865.476(d), 47 Fed. Reg. 35,249, 35,254 (1982). In contrast, the final regulations allow federal court enforcement. 49 Fed. Reg. 31,403 (1984). HUD explained its changed position position as follows:

> some plaintiffs may prefer to challenge PHA determinations in Federal rather than State court and . . . the Department's power to preclude access to Federal court is doubtful. The Department also recognizes that not all States may have adopted procedures providing for judicial review of administrative action. Id.

ress has assigned to HUD reveals a congressional dissatisfaction with HUD which belies any claim that Congress desires HUD to be the exclusive enforcer. The 1969 Brooke Amendment assigned HUD the vital responsibility to define the income to which the 25 percent limitation was to be applied. Pub. L. No. 91-152, § 213(a), 83 Stat. 379, 389 (1969). Barely one year later, after HUD had established an income definition which was quite unfavorable to the tenants (HUD's March 16, 1970 Circular, supra note 3), Congress severely circumscribed HUD's discretion by specifying seven mandatory income deductions. Pub. L. No. 91-609, § 208(a), 84 Stat. 1770, 1778 (1970). In 1981 Congress lifted the restraints briefly. Pub. L. No. 97-35, § 322(a), 95 Stat. 400, 401 (1981). When HUD proposed a definition of adjusted income which Congress found too restric-

tive (47 Fed. Reg. 57,954 (1982)), Congress immediately withdrew the discretion it had granted in 1981 and dictated the adjustments to income in the statute. 42 U.S.C. § 1437a(b)(5) (1982).

A similar decision not to rely upon HUD is reflected even in the 1981 legislation that prescribed the rent formulas directly in the statute, revoking the PHAs' power to set their own rents at levels beneath the federal maximum and repealing HUD's previously conferred power to review those rents. Congress' repeated distaste for HUD's definitions of income and its removal of HUD from the rent approval process cannot be reconciled with any inference that simultaneously Congress was implicitly deciding that it would rely only upon HUD to enforce the tenants' rights.

C. HUD's Enforcement Capacity

Severe limitations in HUD's moni-

toring resources and enforcement structure rapidly became apparent when they are realistically scrutinized. Those limitations also make it difficult to conceive that Congress has silently chosen to rely solely upon HUD to enforce the rent limitation and thus to preclude Section 1983 enforcement.

To accurately appraise HUD's role as an enforcer, one must first review HUD's resources. In fiscal year 1986, nationwide there are 3,068 housing authorities, which operates 11,621 projects containing 1,270,761 units of public housing.[17] HUD has 11,663 employees, but only 1,113 of them have responsibilities relating to

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17. HUD, Congressional Justifications for 1986 Estimates, T-5 (March 1985), reprinted in HEARINGS ON DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT - INDEPENDENT AGENCIES APPROPRIATIONS FOR 1986, Subcommittee of House Committee on Appropriations, 99th Cong., 1st Sess., Part 5, p. 231 (1985) (hereinafter Congressional Justifications).

public housing. Id. at B-26and T-1.[18] Of those 1,113, only 973 are assigned to the HUD field offices (Id. at T-6), which have the major responsibility for monitoring PHAs.[19] Even within the field offices, only 449 of the 973 employees with public housing responsibilities have duties which relate to management. Congressional Justifications, p. T-12. When the 3068 PHAs are divided up among those 449 employees, HUD ends up, on an average, with only two staff months per year which can be devoted to any particular PHA.

Of course, only a minute fraction of the two months available for each PHA can

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18. HUD reports its staffing patterns in three formats, full-time permanent appointments, full-time equivalent, and staff years. We are using the figures for staff years as they are most comprehensive.

19. HUD, FIELD OFFICE MONITORING OF PUBLIC HOUSING AGENCY (PHA) ADMINISTRATION OF THE LOW-INCOME PUBLIC HOUSING PROGRAM, Ch. 1, ¶ 1-1(b) (Handbook No. 7460.7, 1981).

be devoted to monitoring and enforcing compliance with the federal laws relating to utility allowances. These 449 field office personnel are responsible for all aspects of public housing management. Because of the broad scope of that responsibility, HUD divides these employees into five separate specialist categories, only one of which -- Utility Specialist -- is concerned with utility issues. Id. at T-10 - T-11. Even for the utility specialists, tenants' utility allowances comprise only one small aspect of their jobs. They must also give attention to the types of utility services provided, the types of equipment utilized, energy conservation measures, insulation, and relations with the local utility companies. Id. Given these resources, it is clear that HUD cannot be relied upon to be the sole enforcer of these federal laws and one cannot pre-

sume, from congressional silence alone, that Congress was so foolhardy as to have done so.

HUD has also established no structure to facilitate effective enforcement of tenants' utility allowance rights. Most significantly, HUD has no mechanism for tenants to complain to HUD when their PHA surcharges for reasonable utility usage. HUD has administrative complaint procedures for some people.[20] HUD has established no such mechanisms for public housing tenants to complain to HUD when their PHA defies federal law in the setting of utility allowances. In fact, HUD does not even have any system to

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20. They include, for example, bankers, builders, and landlords, threatened with debarment because of past malfeasance (24 C.F.R. § 24.7); fund recipients facing grant termination because of racial discrimination (Id. at §§ 2.1-2.131); land subdividers charged with violating the Interstate Land Sales Registration Act (Id. at Part 1720) and private individuals seeking redress for discrimination by landlords, real estate agents and lenders. See Id. at §§ 105.11-105.22.

ensure that tenants are informed of their rights to adequate utility allowances, much less of a right to complain to HUD should those rights be violated.

This gap in HUD's enforcement efforts is reflective of HUD's long-standing antipathy toward any administrative mechanisms that might allow the intended beneficiaries of its programs to bring complaints to HUD for redress. Time after time, HUD has had to be goaded by the courts and Congress to recognize the rights of tenants to complain and to be heard.[21] Even when HUD does establish

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21. Compare 24 C.F.R. Part 450, 41 Fed. Reg. 43,330 (1976) with McQueen v. Drucker, 317 F. Supp. 1122 (D. Mass. 1970), aff'd on other grounds, 438 F.2d 781 (1st Cir. 1971). Compare 24 C.F.R. § 401, 40 Fed. Reg. 29,073 (1975) with Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973) and Keller v. Kate Maremount Found., 365 F. Supp. 798 (N.D. Cal. 1972), aff'd, 504 F.2d 483 (9th Cir. 1974). Compare 24 C.F.R. § 882.216, 49 Fed. Reg. 12,215 (1984) with Nichols v. Landrieu, No. 79-3097 (D.D.C. injunction entered Sept. 12, 1980), subsequent opinion on attorneys' fees, 740 F.2d 1249, 1251-52 (D.C. Cir. 1984). See 24 C.F.R. Part 245, 50 Fed. Reg. 32,396 (1985), implementing 12

a tenant complaint system, most often the system uses some forum other than HUD, either the courts, the PHAs or the private landlords, with no right to appeal to HUD.[22] HUD's long-standing antipathy toward the filing of tenant complaints at HUD should make a court chary of presuming that Congress intended HUD to enforce tenants' rights.

HUD also has no mechanisms to trigger its own enforcement of the utility allowance requirement in a timely and effective manner. As the facts of this case demonstrate, one cause of PHA noncompliance with the federal law is inaction by the PHA caused by either its failure to monitor its utility allowances or a deliberate decision to disregard the rules. HUD does require housing authori-

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U.S.C. § 1715z-1b, Pub. L. No. 95-557, § 202, 92 Stat. 2088 (1978).

22. See 24 C.F.R. § 247.6 (1985) (courts); 24 C.F.R. § 882.216 (1985) (PHAs).

ties to review and adjust their utility allowances annually. 24 C.F.R. § 965.478 (1985). However, HUD does not require PHAs to file reports summarizing their annual reviews and has no other triggering device to alert it to non-compliance of this type. HUD previously required that PHAs to submit their allowances to HUD for approval. Former 24 C.F.R. § 865.473. Thus, HUD could catch allowances which were set improperly, either too low or too high. In its 1984 regulations, HUD withdrew the HUD approval requirement (24 C.F.R. § 965.473(d) (1985)), thus eliminating HUD's only mechanism for timely detection of improper utility allowances.

All that is left to trigger HUD enforcement is HUD's promise that utility allowances "will be reviewed in the course of audits or reviews of PHA operations." Id. HUD's audit and review

functions are governed only by an internal handbook.[23] Limited utility reviews, done in accordance with the Handbook, will not provide the relief tenants need. In ideal circumstances, they are scheduled only once every four years and they need be scheduled only once every eight years. Id. at Ch. 6, ¶ 6-2(b). In-depth utility reviews will provide no more satisfaction. They could be triggered by a significant number of tenant complaints, (Id. at Ch. 6, ¶ 6-2(a) and Ch. 2, ¶ 2-1(c)(1)(g) and (i)), but with no established tenant complaint structure and no scheme to inform tenants of their right to complain, that trigger will rarely be tripped.

Moreover, the field office personnel

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23. HUD, FIELD OFFICE MONITORING OF PUBLIC HOUSING AGENCY ADMINISTRATION OF THE LOW-INCOME PUBLIC HOUSING PROGRAM (Handbook No. 7460.7, Rev., Sept. 6, 1985).

are allowed as much as four years from the identification of the problem to begin the review (Id. at Ch. 6, ¶ 6-1(a)) and no review question specifically asks whether the PHAs have conducted annual reviews or whether utility rates have increased by 10 percent or more. Id. at Appendix 12. Neither the timing nor the content of HUD's review scheme engenders any faith that HUD can be relied upon to enforce tenants' rights to adequate utility allowances.

Any limited hopes one might have that HUD could safely be relied upon are dashed by a candid appraisal of HUD's financial incentives. When utility allowances are adjusted upwards in compliance with federal law, it is HUD, not the housing authority, which ends up paying the extra costs. When the utility surcharges paid by the tenants decrease, the operating subsidies from HUD in-

crease, dollar for dollar. 24 C.F.R. § 990.104(a) (1985). Thus, HUD has a strong financial incentive not to enforce tenants' rights not to be surcharged for reasonable utility use.

If there were any doubt about HUD's incapacity to enforce the utility requirements, a report done by the HUD Inspector General would dispel it.[24] The Report summarizes its findings regarding HUD field office enforcement as follows:

> Field Offices were not adequately reviewing and analyzing PHAs' utility operations. As a result, deficiencies directly affecting tenants' utility allowances and HUD operating subsidies were not disclosed. Field Office reviews and analyses did not identify those PHAs: (1) using outdated or inadequate utility allowances; (2) using utility allowances which were not approved by HUD; (3) not charging tenants for excess utility usage or charg-

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24. HUD, Office of Inspector General, UTILITY CHECK-METERING AND ALLOWANCES (81-TS-101-0012 August 6, 1981).

> ing for excess utility usage at a rate below the PHAs' cost; or (4) paying retail utility bills. In addition, when Field Office reviews and analyses did disclose a deficiency, follow-up action was not taken to ensure that the reported problem was corrected.

Id. at p. 12.

There is, thus, no basis to fairly conclude that Congress could have assigned to HUD the exclusive right to enforce the federal laws guaranteeing tenants adequate utility allowances and thereby silently repealed the tenants' rights to do so under Section 1983.

III. REFUND OF PLAINTIFFS' MONEY IS AN APPROPRIATE REMEDY IN THIS ACTION

An order requiring the defendant to return the money that it wrongfully extracted from plaintiffs is an appropriate remedy in this action.[25] The

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25. Whether a particular remedy is appropriate presents a question which is distinct from the question whether private parties have a cause of action. See, e.g., Davis v. Passman,

determination whether the remedy is appropriate begins with the principle that "where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief." Guardians Association v. Civil Service Commission, supra, 463 U.S. at 595 (White, J., citing, Bell v. Hood, 327 U.S. 678, 684 (1946)). In certain situations it may not be appropriate to grant monetary relief to redress local government violations of federal laws.[26] However, this is not such a case.

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442 U.S. 228, 239 (1979); Guardians Association v. Civil Service Commission, 463 U.S. 582, 595 (1983). Thus, considerations about the remedy are not relevant to the determination whether plaintiffs have a cause of action under Section 1983.

26. See Guardians Association v. Civil Service Commission, supra, at 596 (White, J.). But see id. at 612 (O'Connor, J., concurring in judgment), 624-34 (Marshall, J., dissenting), and 635 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting).

Here plaintiffs seek a limited remedy, i.e., return of their money that was wrongfully taken from them. That remedy raises no concerns about unfairness that more open-ended liability might create. The amount to be awarded any claimant would be limited to the amount which the PHA has wrongfully taken from that claimant. The recovery is measured by a strict standard, unlike tort damages where flexibility accorded to triers of fact can lead to more open-ended liability. Just as importantly, the refund ordered will exactly equal the amount which the PHA has gained through its wrongdoing. Unlike a tort or contract damage action, where a plaintiff's award is not limited to the benefit the defendants have gained from their wrongdoing, here the PHA will not be obliged to pay money it never received. The number of claimants is also limited, not open-

ended. The only qualified claimants are tenants who have lived in defendant's projects and from whom the defendant has illegally extracted money. Thus, this case is not like one in which a welfare department risks liability to a large, unknown number of potential recipients who may be wrongfully disqualified.

More fundamentally, however, allowing a PHA to keep money which it had wrongfully taken from its tenants provokes a profound sense of injustice. To the extent that a court decides that a PHA has violated federal law when requiring its tenants to pay utility surcharges, the inevitable conclusion must be that the money so taken rightfully belongs to the tenants. Fairness demands that it be returned to them.

This case also raises no concern about liabilities a local government did not and could not anticipate. Compare

Guardians Association, supra, 463 U.S. at 596. The defendant's conduct constitutes a knowing violation of clear conditions imposed by Congress and HUD. The PHA's obligation not to charge more than the federal maximum for rent and not to surcharge for reasonable use of utilities have been clear and unambiguous since 1970. The standards and procedures the PHA must follow in determining what utility usage is reasonable have also been clearly and unambiguously spelled out since 1980. 45 Fed. Reg. 59,502 (1980). The defendant was clearly made aware of these obligations and had ample time to comply. The regulations were published in the Federal Register, the PHAs were allowed more than 120 days to comply (former C.F.R. § 865.482) and the local HUD field office individually notified the PHA about the new regulations. Int. Ans. No. 19. Thus in this

case the defendant cannot and does not claim ignorance of these federal rules.

The defendant does not contend that it took the steps required by the 1980 regulations or that its utility allowances were in fact in conformity. Instead, having no colorable defense or justification for not complying with the federal law, defendant merely asserts that it "deemed" its old allowances to be in compliance with the 1980 regulations. Int. Ans. No. 19(c). Given the clarity of the federal laws and the defendant's deliberate disdain for them, this is a situation where one can only conclude that defendant knew or should have known of its wrongdoing.

It is also important to remember that, unlike some cooperative federalism programs, the public housing program requires local government participants to make 40-year commitments to own and

operate the housing projects in accordance with federal law. The federal government provides all the subsidies needed to pay the costs not covered by tenants' rents. As this Court recognized in Thorpe v. Housing Authority, 393 U.S. 268, 279 (1969), Congress and HUD have retained the power to create additional rights for the tenants and correlative obligations for the housing authority, at least as long as the federal government provides the financial resources the PHAs need to meet those obligations. The revenue losses PHAs encountered because of the rent limitation Congress imposed in 1969 and the implementing utility usage standards HUD promulgated in 1980 were fully offset by increased operating subsidies from HUD. Thus, this is not a case in which a court should withhold a damage remedy because a local government has retained a privilege to withdraw when

faced with unanticipated burdens.

Because of the long-term commitments that federal housing landlords make and the federal government subsidies which cover expenses that exceed rents, the normal practice in the federal housing programs has been to provide refunds when tenants have been unlawfully overcharged. Numerous examples demonstrate this.[27] Some of them are in the utility allowance

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27. HUD's initial Brooke Amendment Circular specified that PHAs which were unable to comply by March 24, 1970, would have to do so retroactively. HUD's March 16, 1970 Circular, supra note 3, p. 3. The HUD Circular implementing the 1971 welfare amendment also required PHAs to make the changed rents retroactive to the statute's effective date. HUD's January 18, 1972 Circular, supra note 7, p. 2. HUD's regulations implementing the 1983 statutory definitions of adjusted income established an elaborate system of rent credits and refunds for tenants who were overcharged after the regulations became effective. 24 C.F.R. § 913.110(f) and (g) (1985). Finally, HUD's AUDIT HANDBOOK expressly recognizes a PHA's obligation to reimburse tenants who have been improperly overcharged and contemplates retroactive increases in operating subsidies to offset the PHA's cost of doing so. HUD, PUBLIC HOUSING AUDIT HANDBOOK, Ch. 4, ¶ 3-3(f)(2) (Handbook No. 7465.2, Rev. Sept. 1985).

area itself.[28] Most significantly for the case before this Court, the 1980 regulations specified that the PHAs were to establish allowances in conformance with the new standards "effective as of a date no later than 120 days from the effective date of this rule . . . ." Former 24 C.F.R. § 865.482. As with the initial Brooke Amendment Circular, HUD in this regulation required PHAs that did not meet the 120-day deadline to retroactively make their changes effective as of the 120-day date. Thus, here, a court-ordered refund provides the most appropriate relief.

CONCLUSION

Public housing tenants have a federally secured right not to be surcharged when they use only a reasonable

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28. HUD's 1984 regulations specifically require that adjustments in allowances that result from rate changes must be made retroactive to the time of the rate change. 24 C.F.R. § 965.478(b) (1985).

amount of utilities in their homes. Congress has expressed no intention to prevent tenants from using the presumptively available § 1983 cause of action to enforce that federal right in federal court. The appropriate remedy to redress the injury to plaintiffs is a court order requiring the defendant housing authority to return the moneys it wrongfully took from plaintiffs. For those reasons the decision of the Court of Appeal should be reversed.

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March 28, 1986

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1985

No. 85-5915

BRENDA E. WRIGHT, et al., Petitioners,

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 1986, packages containing three copies of the foregoing Brief for Amicus Curiae, National Housing Law Project, were deposited in the Post Office at Berkeley, California, with first class postage, prepaid, addressed to:

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